IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 333

IRENE NUNNERY THERIOT, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 12, 1952.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered in the above-entitled cause May 27, 1952. Petition for rehearing was denied June 17, 1952.

OPINIONS BELOW

The Findings of Fact and Opinion of the Tax Court (R. 17-27) are reported at 15 T. C. 912. The Opinion of the Court of Appeals (R. 61) is reported at 197 F. 2d. 13.

JURISDICTION

The jurisdiction of the Supreme Court to review this case rests upon 27 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Is it mandatory that taxable income be computed on the basis of taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer?

2. Are there any circumstances in this case which permit a deviation from the rule requiring that taxable income be computed on the basis of taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer?

3. Is it permissible to file individual income tax returns showing estimated income but not listing items of income and deduction?

4. Is any taxpayer required to file individual income tax returns which can only contain an estimate of his income and another return for the same period when his books are closed eight months later?

5. Where income tax returns are erroneously not filed with income computed in accordance with the taxpayer's annual accounting period, is it necessary to secure the Commissioner's permission before the taxpayer may file returns on the basis required by law?

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code

"Sec. 41. General Rule.

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such

method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

"Sec. 48. Definitions.

"When used in this chapter—

"(a) Taxable Year.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' means, in the case of a return made for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.

"(b) Fiscal Year.—'Fiscal year' means an accounting period of twelve months ending on the last day of any month other than December."

"Sec. 51. Individual Returns.

"(a) Requirement.—Every individual having for the taxable year a gross income of $600 or more shall make a return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations."

Regulations 111

"Sec. 29.41-1. Computation of net income.—Net income must be computed with respect to a fixed period.

Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 29.42-1 to 29.42-3, inclusive [¶ 6203; 8403; 8404].) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it."

STATEMENT OF THE CASE

There is no dispute as to the facts as they were stipulated before the Tax Court.

The taxpayer petitioner married Romeal Theriot on November 25, 1942, and since that time has been his wife. The Theriots are domiciled in Louisiana, where Romeal Theriot operates a business known as R. Theriot Liquor Stores. Prior to November 25, 1942, the taxpayer had worked as a stenographer and her entire income was the salary she received in that position. Prior to November 25, 1942, the taxpayer resigned her position as a stenographer.

Subsequent to her marriage, the taxpayer's sole source of income was her community one-half of the income earned by her husband in the conduct of his liquor business.

After the marriage, the only books kept by either the taxpayer or her husband were the books which were kept on the accrual basis for the business operated as an in-

dividual proprietorship by her husband. The said books were kept on a fiscal year basis ending August 31 and were used in computing the income tax of the petitioner.

Romeal Theriot was divorced from his former wife on September 1, 1942. On June 14, 1942, and prior to the divorce of his former wife, Romeal Theriot made an application to the Commissioner of Internal Revenue for permission to change his accounting period to a fiscal year ended August 31. This permission was granted by the Commissioner on June 25, 1942, to "Mr. and Mrs. Romeal Theriot."

At all times subsequent to September 1, 1942, Romeal Theriot's books have been kept on the fiscal year and accrual basis and his income reported in accordance therewith. On November 15, 1943, Romeal Theriot filed his income tax return for the fiscal year ended August 31, 1943. On January 15, 1945, Romeal Theriot filed his income tax return for the fiscal year ended August 31, 1944. Romeal Theriot also filed income tax returns on a fiscal year basis for the fiscal years ended August 31, 1945 and 1946.

There was some confusion with respect to reporting Mrs. Theriot's income. This confusion does not obscure the primary issue. The facts in detail are as follows:

Prior to 1942, taxpayer filed her income tax return on a calendar year cash receipts and disbursements basis and on March 15, 1943, she filed her return for the year 1942. The only income reported in that return was $1,217.27 which she had earned in 1942 as a stenographer, prior to her marriage.

On December 15, 1943, after the close on August 31, 1943, of the community's first fiscal year, Mrs. Theriot filed an amended return for the calendar year 1942. This return also showed the $1,217.27 salary. In addition, it showed her proportionate share of the community income of the petitioner and her husband for the period from November 25, 1942, to August 31, 1943. The amount so computed as being applicable to the calendar year 1942 was $17,283.79.

On May 15, 1944, the taxpayer filed her income tax return for the calendar year 1943. The said return merely showed an estimated tax. No items of gross income or deduction were listed on the return. The said return contained the notation, "This return subject to amendment after August 31, 1944." On lines 18 and 19 of Page 1 of this return, the taxpayer stated that her income was one-half of the estimated income of Romeal Theriot. On January 15, 1945, the taxpayer filed an amended community return for the calendar year 1943 in which she allocated to her calendar year income a proportionate share of her husband's income for the fiscal year ended August 31, 1943, and a proportionate share of her husband's income for the fiscal year ended August 31, 1944.

On March 15, 1945, the taxpayer filed her income tax return for the calendar year 1944. The said return merely showed an estimated tax. No items of gross income or deduction were listed on the return. It contained the notation, "This return subject to amendment after August 31, 1945." On January 15, 1946, the taxpayer filed an amended community return for the calendar year 1944 in which she allocated to her calendar year income a proportionate share of her husband's income for the fiscal year ended August 31, 1944, and a proportionate share of her husband's income for the fiscal year ended August 31, 1945.

On March 26, 1946, the taxpayer filed her income tax return for the calendar year 1945. It contained the notation, "Community return—Subject to amendment after August 31, 1946." The said return merely showed an estimated tax. No items of gross income or deduction were listed on the return. On August 21, 1947, the taxpayer filed an amended community return for the calendar year 1945 in which she allocated to her calendar year income a proportionate share of her husband's income for the fiscal year ended August 31, 1945, and a proportionate share of her husband's income for the fiscal year ended August 31, 1946.

November 9, 1945, petitioner filed a claim for refund for

the fiscal year ended August 31, 1944, based on the contention that "She was a member of a community in a community-property state whose books were kept on the above fiscal year basis by permission of the Commissioner."

November 9, 1945, petitioner filed returns for the fiscal years ended August 31, 1943 and August 31, 1944. These returns were based on the books of petitioner's husband.

The Commissioner issued a notice of deficiency on June 20, 1949, in which he determined that the taxpayer is not entitled to file her Federal income tax returns on the basis of a fiscal year ending August 31, and that her taxable years 1942, 1943, 1944, and 1945 were the calendar years 1942, 1943, 1944, and 1945.

The Tax Court on these facts held that the taxpayer's income should be computed from her husband's books which were kept on a fiscal year basis but held that the taxpayer kept no books so that she must file her returns on a calendar year basis.

The Court of Appeals affirmed the Tax Court saying that to attempt to state petitioner's income otherwise than according to her husband's books would lead to a chaotic situation. While it approved such a computation from the books, the Circuit Court held that the income need not be computed in accordance with the annual accounting period upon which the books were kept. It held that an estimated tax return not showing items of income and deduction could be filed and later amended.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that it is not mandatory that taxable income be computed on the basis of taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer.

2. In holding that in the circumstances of this case it is permissible to deviate from the rule requiring that tax-

able income be computed on the basis of taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer.

3. In holding it is permissible to file individual income tax returns showing estimated income but not listing items of income and deductions.

4. In holding that where income tax returns are erroneously not filed with income computed in accordance with the taxpayer's annual accounting period that it is necessary to secure the Commissioner's permission before the taxpayer may file returns on the basis required by law.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below is in conflict with the decision of the Second Circuit in *Brooklyn City R. R. Co.*, 72 F. 2d 274, 14 A. F. T. R. 428, affirming 27 B. T. A. 77.

In the *Brooklyn City R. R. Co.* case, the evidence showed that since 1890, the petitioner had kept its books and made its annual reports on the basis of a fiscal year ending June 30. However, petitioner, commencing in 1921, filed its income tax returns on the basis of a calendar year. The Commissioner determined a deficiency in tax for the calendar year 1921. In determining that the Commissioner was without authority to compute net income or to determine a deficiency in tax on a calendar year basis, the Board stated at page 81:

> "In our opinion, the statute is mandatory, and, where none of the exceptions applies, as in the instant case, there is no discretion vested in the Commissioner or any one else to compute net income upon any basis other than the taxpayer's annual accounting period. We think it is immaterial that the tax returns were improperly and without authority made upon a differ-

ent basis. The statute does not require that the net income shall be computed upon the basis of the return, if the return is made upon a basis other than the annual accounting period of the taxpayer. * * * ,,

Where it is concluded that an erroneous tax period was employed by a taxpayer, the correct period must be applied as a matter of statutory enforcement. *Swift & Co.* v. *United States*, 38 F. 2d 365 (Ct. Cls.), 8 A. F. T. R. 10182; *Brooklyn City Railroad Company*, 27 B. T. A. 77, aff'd. (CCA 2) 72 F. 2d 274, 14 A. F. T. R. 428. This is so whether the proponent of the correct period is the taxpayer or the Commissioner. Factors of estoppel and long-continued use by the taxpayer, or acquiescence by the Commissioner, are not determinative. In these situations it is neither within the taxpayer's election nor at the Commissioner's discretion. Consequently, the taxpayer may, at any time, shift over to a correct period by a change effected without securing the prior consent of the Commissioner, either by amending his returns to accord with the correct period or by first raising the question at the trial of an action involving enforcement of the tax or a deficiency for the period involved. *Tacoma Grocery Co.*, 1 B. T. A. 1062; *George N. Klemyer*, 20 B. T. A. 934; *Estate of C. H. K. Curtis*, 36 B. T. A. 899; *Elgin Compress Co.*, 31 B. T. A. 273.

II.

The decision of the Court below is in conflict with the specific language of Section 41, Internal Revenue Code, that "net income *shall* be computed on the basis of the taxpayer's annual accounting period * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer." (Italics supplied)

The opinion in this case recognizes that the books from which the income was computed are kept on a fiscal year basis. However, because permission to change to a fiscal year basis was not secured, the Tax Court was sustained. In other words, although the taxpayer admittedly was on a fiscal year basis after her marriage and her income was

computed from books kept on that basis, the opinion say she must report income on a calendar year basis. This does violence to the specific terms of Section 41.

The last paragraph of the opinion says the Tax Court is affirmed because "the requisite permission to change to a fiscal year basis had neither been requested by timely application nor received".

The reasoning quoted confuses the situation here involved with the customary situation where books are kept on one basis and the taxpayer desires to change to another basis. Here, Mrs. Theriot kept no books prior to her marriage.[1] Consequently, she was required under Section 41 to compute income on a calendar year basis. After her marriage, she, for the first time, did have books (community books), so could lawfully compute her income only on the basis of those books. Obviously, her position in this case is the only correct position because she needed no permission to change.

If the petitioner was wrong in computing her income on the basis of the fiscal year used in keeping her books, then she was also wrong in reporting income on the accrual method used in keeping those books. The Court below, however, says it is proper to use the books for the purpose of computing income, but not for the purpose of the annual fiscal period.

III.

The decision of the Court below is in conflict with decisions of this Court, of Circuit Courts of Appeal and with the specific provisions of Section 51, Internal Revenue Code. The Court below states (R. 64):

> "Timely returns could be, and were, filed showing an estimated income and the tax paid thereon, subject to revision at the end of each fiscal year."

In this case the original returns filed each year contained merely an estimated tax and did not show any items of

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[1] Wage earners and farmers are not required to keep books. Reg 111. Sec. 29.54-1.

gross income, deductions and credits. Section 51, Internal Revenue Code, requires that returns show "the items of gross income and the deductions and credits allowed under this chapter * * * ".

This Court has always held that a "return" of the type which the Court below approved is not a "return" as required by law.

In *Florsheim Bros. Drygoods Co.* v. *United States* (1930), 280 U. S. 453, 8 A. F. T. R. 10281, this Court flatly held that a return which is not intended to be a specific statement of the items of income, deductions and credits is not a return. Consequently, the filing of such a return was held not to set limitation in motion. See also *Lucas* v. *Pilliod Lumber Co.* (1930), 281 U. S. 245, 8 A. F. T. R. 10907.

A typical Court of Appeals case is *National Contracting Co.* v. *Commissioner* (CCA 8, 1939), 105 F. 2d 488, 14 A. F. T. R. 688, which states (p. 207):

> "We think the Board correctly held that as the documents filed by the taxpayer did not state, or attempt or purport to state, the items of its gross income or deductions or credits as required by section 239 of the Revenue Act of 1926, they were not the returns required by that section * * *".

The rule announced by the Fifth Circuit in the case at bar is so completely in conflict with the established law that it can only breed uncertainty and litigation.

It should be pointed out that the returns Mrs. Theriot originally filed on a calendar year basis were the only type of returns she could have filed on a calendar year basis because the income had to be determined from the books, and could not be determined until months after a calendar year return was due. Because she made a mistake and filed returns on the erroneous calendar year basis, does not change the law that (1) she was required to file returns on a fiscal year basis in accordance with the books and, (2) she was required to list items of gross income and deductions on her return.

In addition, the opinion apparently overlooks the chaos which it would cause. In order to file a return required under the ruling of the court below, Mrs. Theriot must wait until five and one-half months after her return was due. After the community books are closed on August 31 of the year following Mrs. Theriot's taxable year, the income of that fiscal year must even then be apportioned on an arbitrary basis between two calendar years. One proper return each year is all that the law requires of any taxpayer, but by the decision of the court below, Mrs. Theriot is required to file two. Further, if her guess or estimate of her income falls short of what it is determined to be five and one-half months later, heavy interest charges accrue. If it is too high, she may not apply this overpayment on her estimate taxes for the calendar year as may other taxpayers, but must make claim for refund with its attendant delays.

IV.

The Court below has decided important questions of Federal law which should be settled by this Court. As hereinbefore indicated, the law is thoroughly established that taxable income must be computed on the basis of the taxpayer's annual accounting period in accordance with the methods of accounting regularly employed in keeping the books of such taxpayer. Likewise, the law is thoroughly established that a return in order to be a valid return must show items of income and deductions. The income tax statutes are now so complex and confusing that they are difficult not only for taxpayers, but for many so-called experts to understand. Any deviation from established law will only add to the confusion which in turn will increase litigation. The petition should be granted in order to settle the law.

Respectfully submitted,

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September 12, 1952.

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IRENE NUNNERY THERIOT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 17-27) are reported in 15 T.C. 912. The opinion of the Court of Appeals (R. 61-65) is reported in 197 F. 2d 13.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1952 (R. 65.) The taxpayer's petition for rehearing was denied on June 17, 1952

(R. 72.) The petition for a writ of certiorari was filed on September 12, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The taxpayer's only income after her marriage in 1942 was community income received from her husband's sole proprietorship business, which kept its books and computed and reported its business income on a fiscal year basis, as did the taxpayer's husband.

The question presented is whether, in these circumstances, the taxpayer was entitled upon her marriage in 1942 to effect a change—retroactively by filing amended returns—from her established calendar year basis of computing and reporting income, properly used before and after marriage, to the fiscal year basis of her husband's sole proprietorship business, without first securing the "approval" of the Commissioner as required by the provisions of Section 46 of the Internal Revenue Code and the applicable Regulations promulgated thereunder.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations involved are printed in the Appendix, *infra*, pp. 15-18.

STATEMENT

The facts stipulated and found as stipulated by the Tax Court (R. 18-21) are as follows:

Prior to her marriage to Romeal Theriot on November 25, 1942, the taxpayer had always filed

her income tax returns on the calendar year basis. Subsequent to her marriage, she continued to use the basis of the calendar year and filed timely returns on that basis for the calendar years 1942, 1943, 1944 and 1945. On March 20, 1944, however, the taxpayer requested permission from the Commissioner to compute her income on the basis of a fiscal year ending August 31. She asked that such permission be made retroactive to the fiscal year ending August 31, 1943 (R. 18-19). In denying the taxpayer's request that she be permitted retroactively to compute her income on a fiscal year basis rather than on the calendar year basis which she had employed, the Commissioner replied (R. 19):

> Inasmuch as an application was not filed within the time prescribed by the regulations, no consideration may be given your request insofar as the period ended August 31, 1943 is concerned, and it will be necessary for this taxpayer to continue her present taxable year until such time as a change is authorized as the result of a timely application. Separate returns must be filed by Mr. and Mrs. Theriot until such time as they have a common taxable year.
>
> If Mrs. Theriot desires to change to a taxable year ending on August 31, effective as of August 31, 1944, an application should be filed in accordance with the provisions of section 29.46-1 of Regulations 111. Blank Forms 1128 are enclosed for your convenience in the event that Mrs. Theriot desires to change her taxa-

ble year to correspond with year used by her husband.

The taxpayer made no further request to the Commissioner for permission to change her method of computing income from the calendar year basis to a fiscal year basis. On November 9, 1945, however, the taxpayer filed amended returns in which she attempted to change her method of computing income from the calendar year basis to a fiscal year basis beginning with the short fiscal period November 26, 1942, to August 31, 1943. The Commissioner has not given effect to the amended returns (R. 19-20).

Romeal Theriot, the taxpayer's husband, has been the sole proprietor of R. Theriot Liquor Stores at all times material to this proceeding. The books of R. Theriot Liquor Stores have at all times been kept on an accrual method of accounting. At no time has there appeared on the books of the sole proprietorship a capital account, drawing account, or any other account in the name of the taxpayer. Under the community property laws of Louisiana, the taxpayer has reported on her income tax returns one-half of the income from this business each year since her marriage (R. 20.)

Prior to his marriage to the taxpayer, Romeal Theriot made application to the Commissioner to change his basis of computing income from the calendar year basis to a fiscal year basis. Effective with the fiscal year beginning September 1, 1942, and ending August 31, 1943, Romeal Theriot

was granted permission to compute his income on the basis of a fiscal year. Since that time he has reported his income on that basis, and the books of the business which he has operated as a sole proprietorship have been kept on the basis of the same fiscal year (R. 20.)

At all times material to this proceeding, the taxpayer and her husband have been domiciled in Louisiana (R. 20.)

The taxpayer did not keep any individual books of her own during the years involved. The only books kept by her husband were the books of R. Theriot Liquor Stores which he conducted as a sole proprietorship (R. 20.)

In the notice of deficiency, the Commissioner explained his determination as follows (R. 20-21):

> It is held, after careful consideration of the evidence of record, applicable law and authorities, that you are not entitled to file your Federal income tax returns on the basis of a fiscal year ending August 31st. Your "taxable years 1942, 1943, 1944 and 1945" were properly calendar years 1942, 1943, 1944 and 1945.
>
> It is held, after careful consideration of the evidence of record, applicable law and authorities, that your share of the community income as reflected by your husband's books and records maintained on the basis of a fiscal year ending August 31st, to be included in your calendar year returns, is to be determined on a basis of prorating the income of the fiscal years within your calendar years.

Additional pertinent facts which were stipulated by the parties but not included in the Tax Court's findings of fact are as follows:

The taxpayer's original returns were filed on the calendar year basis for the years 1942 through 1945. By her second set of amended returns filed on November 9, 1945, for the short fiscal period November 26, 1942, to August 31, 1943, and for the fiscal year ended August 31, 1944, the taxpayer attempted to change retroactively her method of computing and reporting income from the calendar year basis to the fiscal year basis. These returns were not acceptable to or given effect by the Commissioner (R. 19-20). However, she had also in the meantime filed, variously, from December 15, 1943, through August 21, 1947, her first amended returns on the calendar year basis for the years 1942 to 1945, inclusive, which were accepted and acted upon by the Commissioner (R. 32-34). As advised by the Commissioner (R. 21), she computed and reported thereon her marital share of the community income for each of those years, determined on the basis of prorating the community income from her husband's sole proprietorship business for the portions of its and his fiscal years ending on August 31 which fell within her calendar years, respectively (R. 32-34).

The taxpayer, on November 9, 1945, upon filing her second set of amended returns purporting to change her method of computing income from the calendar year basis to the fiscal year basis, also

filed a claim for the refund of $67,853.07 income taxes paid for the fiscal year ended August 31, 1944 (R. 35.)

On the basis of these facts, the Tax Court, sustaining the Commissioner's determination, held that the taxpayer was not entitled to file her returns for the years in question on the basis of the fiscal years ending on August 31 (R. 21-27), and the Court of Appeals affirmed (R. 61-65).

ARGUMENT

This case, contrary to the taxpayer's contentions, presents neither a conflict of decisions nor questions of general public importance warranting review by this Court. Substantially the only reason asserted by the taxpayer for allowance of the writ is that since she received no income subsequent to her marriage except community income, and since the community income was computed from the books of her husband's sole proprietorship business which were kept on a fiscal year basis, they were the books of the community and therefore in effect her books as a partner in the marital partnership or community. Pursuing that theory, she contends further that there was no necessity of securing the consent of the Commissioner to change from a calendar year to a fiscal year basis because the statute (Section 41 of the Internal Revenue Code (Appendix, *infra*, p. 15)) is mandatory in its requirement that the return be made on the basis of the annual accounting period in accordance with the method of accounting regularly employed in keeping the books of the

taxpayer; and that in effect she was simply changing from an incorrect basis to a correct basis. The opinions of both lower courts fully disclose that there is no support in the record for these erroneous contentions.

Taxpayer's assertions are based on the erroneous assumption that the books and fiscal year accounting period for computing the income of her husband and his sole proprietorship business are, because of marital and community intervention, purportedly metamorphosed into *her* books and income-computing accounting period for tax purposes, without the Commissioner's prior consent thereto as required by Section 41. This begs the real issue. The point directly in issue is whether the Commissioner was required to approve retroactively the taxpayer's attempted change in her accounting period from the previously established calendar year basis to a fiscal year basis and thereupon accept amended returns on the new basis for all years involved.[1]

The decisions of both courts below are in accord with the fundamental statutory directive in respect of this issue. Under the unambiguous terms of the statute (Section 41), it is clearly mandatory that if, as here (R. 20, 22-23; 62; Pet. 10), "the taxpayer * * * does not keep books, the net in-

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[1] Both courts below passed the other issue as to the taxpayer's motive—materially increased benefits under the forgiveness features provided by Section 6 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126—for desiring the Commissioner's permission to file retroactively effective amended returns on the fiscal year basis (R. 22, 61).

come shall be computed on the basis of the calendar year," as both lower courts held (R. 22, 23, 64). It was also mandatory that the Commissioner's prior consent be secured by filing an application therefor, before the taxpayer could legally change her method of computing and reporting income from the calendar year basis to the fiscal year basis. Section 46 of the Internal Revenue Code; Sections 29.41-2, 29.41-4 and 29.46-1 of Treasury Regulations 111 (all in Appendix, *infra*, pp. 15, 17-18); *Riley Co.* v. *Commissioner*, 311 U. S. 55, 57-58; *Pacific National Co.* v. *Welch*, 304 U. S. 191, 194-195; *Keeler* v. *Commissioner*, 180 F. 2d 707, 710 (C.A. 10th); *American Coast Line, Inc.* v. *Commissioner*, 6 T.C. 67, affirmed, 159 F. 2d 665, 667 (C.A. 2d); *Commissioner* v. *Saunders*, 131 F. 2d 571, 572, fn. 1 (C.A. 5th), petition for certiorari dismissed, 318 U.S. 796; *Fowler Bros. & Cox* v. *Commissioner*, 138 F. 2d 774, 775-776 (C.A. 6th); *S. Rossin & Sons* v. *Commissioner*, 113 F. 2d 652, 653-654 (C.A. 2d); *United States* v. *Blair*, 293 Fed. 846, 847 (C.A.D.C.), certiorari denied, 264 U. S. 587; *Stewart* v. *United States*, 100 F. Supp. 221, 229 (D. Neb.), and cases cited therein.

Where the taxpayer has once exercised her choice of accounting periods for computing and reporting her income on the calendar year basis, she may not alter or reverse her position by attempting to file amended returns unacceptable to the Commissioner without that official's approval in advance. *Riley Co.* v. *Commissioner*, 311 U. S. 55, 57-58. It is solely within the Commissioner's discretion to ac-

cept or refuse to accept her amended returns, not a matter of right. *Keeler* v. *Commissioner,* 180 F. 2d 707, 710 (C.A. 10th). Here, neither the Commissioner's consent for the change sought by the taxpayer nor his acceptance of the second amended returns was secured by her before or after filing such returns (R. 20-21, 64-65).

As the court below put it in sustaining the computation of the taxpayer's income from the community income shown on her husband's books (R. 63-64)—

> the Tax Court did not treat the books of the husband as the wife's books, but rather, we think, sustained the Commissioner in the exercise of the discretion vested in him by Section 41 of the Internal Revenue Code * * * to approve a method which would clearly reflect the income of the taxpayer.

It was therefore proper for the court below to find (R. 64-65) that:

> Before the taxpayer was married she had properly reported her income on the calendar year basis pursuant to the direction of Section 41. Thereafter, she could not adopt a new period for reporting income or adopt new books for a different period without first receiving the Commissioner's consent. Consistency in the absence of approval is imperative. The reason is clear. If taxpayers were allowed to vacillate at will between the use of a calendar and a fiscal period, depending upon the advantages of the moment, endless and needless con-

> fusion would result and the effectiveness of tax laws would be measurably reduced. * * *
>
> The Commissioner did not err in determining deficiencies on the calendar year basis since the requisite permission to change to a fiscal year basis had neither been requested by timely application nor received. * * *

Moreover, both courts below found that the marriage of the taxpayer in a community property state did not affect the continuity with which she had filed her federal income tax returns on the calendar year basis or create a new taxpayer personality (R. 27, 64). Hence, they properly rejected the contention that the books of the marital community were her books as an individual (R. 22-23, 64). Even though the taxpayer and her husband formed the community in which each possessed a common share, they nevertheless clearly continued to remain separate taxable entities, as before, for federal income tax purposes (R. 64). While the income received by either was, under local law, to be classed as community income, yet either might have had personal income and deductible expenses separate and apart from those reflected in the books of the community and therefore not recorded therein, as both courts below held (R. 23, 64). *Lazard* v. *Commissioner*, 5 T.C. 277, 280-281, affirmed, 153 F. 2d 348, 349 (C.A. 5th); *Guste* v. *Commissioner*, 8 T.C. 1261, 1267-1268. Hence, even if the books of the husband's individual proprietorship business were to be considered the books of the community, it cannot be said that the latter were, in turn, the

books of the taxpayer and her husband as individuals (R. 22-23, 27, 64). Thus, in the analogous case of *Freudmann* v. *Commissioner*, 10 T.C. 775, taxpayer-partners computing their income on the calendar year basis were not permitted, without the Commissioner's prior consent, to change over to the fiscal year basis of their partnership, upon which it kept its books and reported its income. Their election to file their personal returns on a fiscal year basis was inoperative for they had failed to keep books of their own and the books kept by the partnership were not the books of the partners as individuals. 10 T.C. at 791-794. See also *Klempner* v. *Glenn*, 82 F. Supp. 626, 630 (W.D. Ky.); *Stryker* v. *Commissioner*, 36 B.T.A. 326, 328; *Drake* v. *Commissioner*, 1 B.T.A. 1235, 1237.

Of the cases cited by the taxpayer only three bear on the issue here and these neither support her position nor present a conflict with the decision of the court below. *Brooklyn City Railroad Co.* v. *Commissioner*, 27 B.T.A. 77, affirmed, 72 F. 2d 274 (C.A. 2) (Pet. 8), was clearly and correctly distinguished by the Tax Court, which pointed out that the taxpayer in that case had merely attempted to have the basis on which its returns were filed conform with the basis on which its books had always been kept (R. 24). Here, taxpayer kept no books of her own at any time and had established a calendar year basis for income-computing accounting period purposes. This case does not turn upon that portion of Section 41 which relates to the method of accounting regularly employed in keep-

ing the books of the taxpayer as did the *Brooklyn City Railroad* case, but rather upon that portion of Section 41 which relates to taxpayers who do not keep books. The remaining two cases involve completely different factual situations and statutory provisions. *Florsheim Bros.* v. *United States,* 280 U.S. 453 (Pet. 11), was concerned with the question of what constituted a "return" for the purpose of starting the running of the statute of limitations on assessment. To meet the "peculiar exigency" created by the Revenue Act of 1918, 40 Stat. 1057, the Commissioner had prepared a "novel device" for the use of taxpayers, a "Tentative Return"—Form 1031 T. 280 U.S. at 460, 464. This Court merely held that the information required by that form and submitted by the taxpayer was inadequate to start the statute of limitations. In *National Contracting Co.* v. *Commissioner of Internal Revenue,* 105 F. 2d 488 (C.A. 8) (Pet. 11), the Court of Appeals for the Eighth Circuit held that the documents filed by the taxpayer in its self-styled "Tentative Return" were insufficient to start the running of the statute of limitations. The Court stated that the return "did not evince 'an honest and genuine endeavor to satisfy the law' . . ." 105 F. 2d at 491. If, as taxpayer seems to contend, such a test is to be applied to her case, her earlier returns have been satisfactory (R. 64), and there would appear to be no reason why they cannot continue to be so. And, of course, petitioner may apply to the Commissioner for permission to change her accounting period, a course the Commis-

sioner has called to her attention (R. 19)—one which she has yet to undertake.

CONCLUSION

The decision below is correct, turns upon the particular facts of this case, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER, 1952.

APPENDIX

Internal Revenue Code:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 46. CHANGE OF ACCOUNTING PERIOD.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 47.

(26 U.S.C. 1946 ed., Sec. 46.)

SEC. 47. RETURNS FOR A PERIOD OF LESS THAN TWELVE MONTHS.

(a) *Returns for Short Period Resulting from Change of Accounting Period.*—* * * If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. * * *

(b) *Income Computed on Basis of Short Period.*—Where a separate return is made under subsection (a) on account of a change in the accounting period, and in all other cases where a separate return is required or permitted, by regulations prescribed by the Commissioner with the approval of the Secretary, to be made for a fractional part of a year, then the income shall be computed on the basis of the period for which separate return is made.

* * * * *

(26 U.S.C. 1946 ed., Sec. 47.)

SEC. 48. DEFINITIONS.

When used in this chapter—

(a) [As amended by Section 135 (d) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Taxable Year.*—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" means, in the case of a return made

for a fractional part of a year under the provisions of this chapter or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.

(b) *Fiscal Year.*—"Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

* * * * *

(26 U.S.C. 1946 ed., Sec. 48.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.41-2. *Bases of Computation and Changes in Accounting Methods.*—

* * * * *

A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner.* * * Application for permission to change the method of accounting employed and the basis upon which the return is made shall be filed within 90 days after the beginning of the taxable year to be covered by the return. * * *

* * * * *

Sec. 29-41-4. *Accounting Period.*— * * * Except in the case of a first return for income tax a taxpayer shall make his return on the basis upon which he made his return for the

taxable year immediately preceding, unless, with the approval of the Commissioner, he has changed his accounting period. See section 29.46-1.

Sec. 29.46-1. *Change of Accounting Period.* —* * * However, if the fractional part of the year for which a return would be required to effect the change ends after July 31, 1943, such taxpayer shall, before using the new period for income tax purposes, secure the consent of the Commissioner, and application for permission to change the accounting period shall be made direct to the Commissioner on Form 1128 at least 60 days prior to the close of the fractional part of the year for which a return would be required to effect the change. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 333.

IRENE NUNNERY THERIOT, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The Commissioner's brief (p. 12) states:

"Here, taxpayer kept no books of her own at any time, and had established a calendar year basis for income-computing accounting period purposes."

The Commissioner, despite the quoted statement does not attempt to assist this Court by explaining how, in the light

of this statement, the Commissioner (1) used the community books to compute the amount of the taxpayer's income and (2) used the accrual method of accounting in so computing income. This is important because, prior to her marriage, the taxpayer as a wage earner kept no books so reported income on the cash and calendar year basis.

Summarized, the Commissioner insists that the taxpayer kept no books and, therefore, must adhere to her prior practice of reporting on the calendar year basis, but, at the same time, says he will compute the income from the community books kept on the accrual method. All authority is that, if income is computed from books, the books must be followed, both as to method of accounting and fiscal year. The Commissioner tries to get around this situation by not making one word of argument with respect to it. The Commissioner, in order to exact taxes not due, seeks to here ignore the books for the purpose of determining the fiscal period to be used, but to recognize them for purposes of computing the amount of income and the use of the accrual method of accounting in computing the said amount.

The Commissioner argues, by inference at least, that the community books are not the wife's books when she had no income except community income. (Resp. Br. 8) The Circuit Court of Appeals states (R. 64):

> "It is true that in this case *all of the taxpayer's income* was her community share of the income of her husband, which *was computed from the books* of her husband's business, and it would *appear entirely unrealistic* for the taxpayer to have kept any books other than the community books. * * * " (Italics supplied)

In view of the quoted statement, it is difficult to state that the taxpayer had no books. What the Commissioner and the Courts below really say is that she had books for every purpose except when having books would do her some good taxwise.

The Commissioner has always recognized that community income must be reported in the same manner by both husband and wife. In O.D. 909, 4 C.B. 254 (1921) it is stated:

> "In returns in which community income is divided between husband and wife domiciled in States where such income is divisible for income tax purposes, both husband and wife should report in detail the gross income from such community property. The deductions properly chargeable against such income should be equally divided between husband and wife."

The Courts have uniformly followed the rule of O.D. 909. In *Stewart* v. *Commissioner*, 35 BTA 406, aff'd (CCA 5, 1938) 95 F. (2d) 821, 21 AFTR 20, the Court pointed out that in dealing with separate returns in a community property state:

> "Income and deductions (of husband and wife) must be accounted for on the same basis."

In the case at bar, the Commissioner is arguing that the quoted rule is to be applied to the extent it increases the tax and not applied when it reduces the tax.

Cf. *Howard* v. *United States* (D. C. La. 1941), 40 F. Supp. 697, 28 AFTR 133, aff'd (CCA 5, 1942) 125 F. (2d) 986, 28 AFTR 1198. In the *Howard* case, both courts held that the payments made from bank accounts standing in a husband's name were, as a matter of law, the same as though the accounts stood in the name of both spouses.

The cases relied upon by the Commissioner have no application to the case at bar. For instance, *Riley Co.* v. *Commissioner*, 311 U. S. 55, involved a situation where a mining corporation filed a tax return before it knew of a recently enacted provision of the Revenue Act allowing it to take percentage depletion if an election were made on the "first return." This Court held that a "first return" having been made, the literal meaning of the statute must be followed and that an amended return making the election could not be filed.

The *Riley* case supports taxpayer's contention that the literal language of the Internal Revenue Code must be followed, i.e.:

(1) That it is mandatory that taxable income be computed on the basis of taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer.

(2) That it is mandatory that individual tax returns show all items of income and deduction.

Lazard v. *Commissioner*, 5 T.C. 277, aff'd 153 F. (2d) 348, *Guste* v. *Commissioner*, 8 T.C. 1261, and other partnership cases cited by the Commissioner are not applicable because they involve partnerships. Partnerships are required:[1]

(1) To compute partnership income.

(2) To file returns showing:

(a) All items of income of the partnership;

(b) All items of deduction of the partnership;

(c) The portion of net income of the partnership allocable to each partner.

In addition, the Internal Revenue Code specifically recognizes that members of partnerships may have different taxable years than the partnership of which they are members.[2]

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[1] Sections 181-184, Internal Revenue Code.

[2] Sec. 188, I.R.C. Different Taxable Years of Partner and Partnership.

If the taxable year of a partner is different from that of the partnership, the inclusions with respect to the net income of the partnership, in computing the net income of the partner for his taxable year, shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1939) ending within or with the taxable year of the partner.

The foregoing provisions relating to partnerships do not apply to marital communities.

CONCLUSION.

There is direct conflict between the case at bar and the cases cited in the petition for certiorari. If these conflicts are not resolved, the only effect of the decision in this case will be to breed litigation.

Respectfully submitted,

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November 4, 1952.